No. 80-1949

Office Supreme Court, U.S.
FILED
JUL 18 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1980

B.F. and S.F.
"B.F. and S.F. as next friends of P.F., brother of T.A.F., and as members of and on behalf of the extended family of T.A.F., J.P.L., J.L., E.M., P.M., J.M., & M.M."
J.L., J.E.L., E.M., P.M., J.M., and M.M.,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF COLORADO,
In the Interest of T.A.F., a child,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

William Thiebaut, Jr.
of Ballas, Maggio & Thiebaut, P.C.
401 W. 12th Street
Pueblo, Colorado 81002
303-544-3800

Attorney for Respondents

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	(i)
TABLE OF AUTHORITIES	
Cases	(ii)
Statutes	(iv)
Other Authorities	(iv)
JURISDICTION	1
STATEMENT OF THE CASE	10
SUMMARY OF ARGUMENT	13
ARGUMENT	14
CONCLUSION	18

TABLE OF AUTHORITIES

Cases	Page
Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975)	14
Brinkerhoff-Faris Trust & Savings Company v. Hill, 281 U.S. 673 (1930)	5
Cousins v. Wigoda, 419 U.S. 477 (1975)	4
Cramp v. Board of Public Instruction, 368 U.S. 278 (1961)	4
Edelman v. State of California, 344 U.S. 357 (1953)	4
Henry v. State of Mississippi 379 U.S. 443 (1965)	1,9
John Doe and Jane Roe v. State of Delaware, 49 U.S.L.W. 4250 (U.S. March 10, 1981)	3
Lassiter v. Department of Social Services of Durham County, N. N.C., 49 U.S.L.W. 4586 (U.S. June 1, 1981)	6,7,15, 16,17
Mathews v. Eldridge, 424 U.S. 319 (1976)	16

Parham v. J.R., 442 U.S. 584 (1979) 14

People in Interest of K.S., Colo. App., 515 P.2d 130 (1973) 10

People in Interest of M.D.C.M., 34 Colo. App. 91, 522 P.2d 1234 (1974) 8

People in Interest of M.M., Colo. 520 P.2d 128 (1974), and 533 P.2d 913 (1975) 10

People in Interest of S.S.T., Colo. App., 553 P.2d 82 (1976) 10

People in Interest of T.A.F. v. B.F. Colo. App., 624 P.2d 349 (1980) 12

People In Re C.P. & D.P., Colo. App., 524 P.2d 316 (1974) 8

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 4

Webb v. Webb, 49 U.S.L.W. 4500 (U.S. May 19, 1981) 2

White v. Davis, 163 Colo. 122, 428 P.2d 909 (1967) 12

Statutes

28 USC §1257 (3) (1948) 1

Colo. Sess. Laws, 1977, Ch. 248, Sec. 19-11-103 (3) at 1027 7

Colo. Sess. Laws, 1972, Ch.36, Sec. 22-10-8, at 154 7

Title 19, Article 3, C.R.S. 1973 10

Title 19, Article 11, C.R.S. 1973 14

Other Authorities

Articles

American Bar Association, Section of Family Law Newsletter, Vol 16, No. 2, Fall, 1975 7

Rules

Supreme Court Rule 21.1(h) 3

C.R.C.P. Rule 60(b) 12

Treatises

Wright, Miller, Cooper, and
Gressman, Federal Practice
and Procedures: Jurisdiction
Section 4019
Section 4020
Section 4021
Section 4024

JURISDICTION

Petitioners contend that jurisdiction for this Court's review of the State Court's decision in the present case People in Interest of T.A.F. vs. B.F., Colo. App., 624 P.2d 349 (1980) is founded upon 28 U.S.C. §1257(3) (1948). Review is precluded, however, if the state court finds adequate procedural reasons for refusing to decide the federal question. Wright, Miller, Cooper and Gressman, Federal Practice and Procedures: Jurisdiction §4019. Petitioners' reliance upon Henry v. State of Mississippi, 379 U.S. 443, (1965), is misplaced because it "might mean no more than that state courts may preclude Supreme Court review of federal procedures unless it is so fatuous as to be "'an arid ritual of meaningless form'."[1] Any state interest

---

[1] Henry v. State of Mississippi, supra,

rising above that level would be sufficiently "legitimate" to be adequate and independent of the federal right asserted." Wright, Miller, Cooper and Gressman, Federal Practice and Procedures: Jurisdiction §4020.

While it is recognized that state law is never entirely independent in setting out procedural rules for assertion of federal rights, a majority of decisions seem to allow broad latitude for exacting forfeiture of federal rights as a sanction to compel compliance with state procedure. Wright, Miller, Cooper and Gressman, Federal Practice and Procedures: Jurisdiction §4021.

The threshold procedural requirement for Supreme Court review requires that in the state courts Petitioners raise the federal question. Webb v. Webb,

49 U.S.L.W. 4500 (U.S. May 19, 1981).

Supreme Court Rule 21.1(h) specifies:

> "If review of the judgment of a state court is sought, the statement of the case shall also specify... the method or manner of raising them (federal questions)... such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears...as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari." (Emphasis added)

The instant record is not as fully developed as it should be and the federal issues, if any, were not effectively raised. See: John Doe and Jane Roe v. State of Delaware, 49 U.S.L.W. 4250 (U.S. March 10, 1981).

The independent and adequate state ground doctrine taken into account in

Petitioners Petition for a Writ of Certiorari at 6 ignores the fact that several decisions have applied the adequate state ground tests to find adequate the procedural grounds adopted by state courts for refusing to consider federal questions. Cousins v. Wigoda, 419 U.S. 477, (1975); Edelman v. State of California, 344 U.S. 357, (1953); and Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, (1945).

In seeking to define the limits on state procedural independence, Petitioners cite Cramp v. Board of Public Instruction, 368 U.S. 278, (1961). The opinion probably stands for no more than the power of this Court to invoke its own justiciability notions to deny review. State courts ordinarily may require adherence to their own procedure

in presenting federal issues. Wright, Miller, Cooper and Gressman, Federal Practice and Procedures; Jurisdiction §4024. Admittedly, state independence stands in sharp contrast to the underlying obligation to hear federal claims. But, to say that the state procedural grounds for disregarding the claim in this case cannot be found adequate because they fall below requirements of due process is unsupported. Remedies were made reasonably available to Petitioners to raise their claims and can be distinguished from Brinkerhoff-Faris Trust & Savings Company v. Hill, 281 U.S. 673, (1930), where the state courts had failed in their duty to provide a remedy for a claim.

The state, as predicted by Petitioners, does have an interest in the finality of judgments, especially

where, as here, the family had an opportunity to timely intervene and to appeal an adverse ruling including the 1975 severence order. Colorado also has an urgent interest in the welfare of the child, the interests of society and for there to be a just determination regarding severence of the parental rights by party participants.

There was never a waiver of constitutional rights as advanced by Petitioners. Lassiter v. Department of Social Services of Durham County, N.C., 49 U.S.L.W. 4586 (U.S. June 1, 1981) (Constitution does not require the appointment of counsel for indigent parents in every parental status termination proceeding.). Failure to afford T.A.F. or Petitioners, including P.F., representation is not

fundamental error. Lassiter v. Department of Social Services of Durham County, N.C., supra. That B.F. and S.F. raised their claims of inadequate representation on behalf of P.F. is, therefore, of no significance. Notably, the distinction between a guardian ad litem (GAL) and an attorney has been conveniently avoided.[2] Remedies for vindicating Petitioners' claim concerning inadequate representation existed to the extent constitutionally mandated.

---

[2] A GAL is charged with the representation of a child's interests. Guidelines to assure this representation are set out in the American Bar Association, Section of Family Law Newsletter, Vol. 16, No. 2, Fall, 1975. See also, Colo. Sess. Laws, 1972, Ch. 36, Sec. 22-10-8, at 154. There are tremendous differences and distinctions between representation as a GAL and as an attorney. The Colorado statute then in effect providing for the appointment of a GAL did not require that the GAL be an attorney until amended by Colo. Sess. Laws, 1977, Ch.248, Sec. 19-11-103(3) at 1027.

B.F. and S.F. shift from assertions that T.A.F. and P.F. were inadequately represented to contentions that their constitutionally-recognized family rights were severed thereby being injured in fact allowing them standing to challenge the severence order of 1975. Again, remedies for vindicating Petitioners' claim concerning any recognized family rights existed to the extent constitutionally mandated. Colorado cases have accorded intervention rights at various stages of the dependency and neglect proceedings to those seeking the remedy in a timelyfashion. People In Re C.P. & D.P., Colo. App., 524 P.2d 316 (1974) (Grandmother who was GAL entitled to intervene at the dispositional stage upon proper and timely application); People in Interest of M.D.C.M., 34 Colo. App. 91,

522 P.2d 1234 (1974)(Contemplates the active participation of "interested parties" at the dispositional hearing - adoptive foster parents). State intervention procedure for Petitioners to assert any recognized family rights is not an "arid ritual of meaningless form." Henry v. State of Mississippi, supra. Petitioners could have intervened at any state of the dependency and neglect proceedings. Having failed to do so, they were not parties to the severence order of 1975 and did not suffer a loss of legal rights as a result of that order.

STATEMENT OF THE CASE

This case originated on November 9, 1972, pursuant to court authorization, by the State of Colorado filing a petition alleging that T.A.F. and his siblings, M.F.P. and P.G.F., Jr. were dependent and neglected children. The day after the petition was filed a court employee was appointed GAL for the three children. However, the GAL did not appear at any subsequent proceeding. Parental rights were severed by the trial court on May 12, 1975.[3] This order was not appealed. The children were intermittently in

---

[3] Prior to July 1, 1977 the Court could, as a matter of dispositional alternative, terminate parental rights, Title 19, Article 3, C.R.S. 1973. The statute provided no guidelines or standards so as to allow the court guidance. The criteria for severence was formulated by case law. People in Interest of K.S., Colo. App., 515 P.2d 130 (1973); People in Interest of M.M., Colo., 520 P.2d 128 (1974), Colo., 533 P.2d 913 (1975); and People in Interest of S.S.T., Colo. App., 553 P.2d 82 (1976).

foster placement since 1972. The trial court specifically found that a continuation of such an arrangement was not in the best interests of the children; they were in need of security and stability of adoptive parents; and relative placement was not considered a viable alternative as being in the best interests of the children. Petitioners were joined as respondents in the trial court on March 27, 1979 as a result of interference with the adoptive parents of T.A.F. and on June 5, 1979 were permanently restrained from contacting T.A.F. or his adoptive parents. Notably, the trial court in granting the permanent restraining order found that Petitioners E.M. and P.M. had twice been denied adoptive-parent status of T.A.F., once voluntarily and once following a hearing, and found that the then current adoptive parents' family

ties were to be preserved. White v. Davis, 163 Colo. 122, 428 P.2d 909 (1967). Petitioners requested that the trial court set aside the May 12, 1975 severence order. This request was denied by the trial court on August 16, 1979 because (1) Petitioners (B.F. and S.F.) were not parties at the termination stage (they were aware of the proceedings but failed to intervene), and (2) because they were not parties, they lacked standing under C.R.C.P. Rule 60(b) to set aside the severence order. Only B.F. and S.F. appealed to the Colorado Court of Appeals which affirmed the trial court on August 28, 1980. People in the Interest of T.A.F. v. B.F., Colo. App., 624 P.2d 349 (1980).

SUMMARY OF ARGUMENT

The integrity of the family unit has been recognized and preserved by our system of jurisprudence. It has also been recognized that natural bonds of affection lead parents to act in their child's best interests. In fact, however, reality falls short of this ideal; child neglect and termination cases attest to this. In these proceedings, a child is not a mere creature of the state or property of the parents but has equal status. However, in determining what process is constitutionally due a child in a termination proceeding insofar as representation is concerned, it cannot be said that the constitution requires the appointment of counsel.

ARGUMENT

Unquestionably, this court has placed great weight on the fact that "Our jurisprudence has historically reflected Western Civilization concepts of the family as a unit..." Parham v. J.R., 442 U.S. 584 (1979). Equally, it has recognized that parents "may at times be acting against the interests of their children", Parham v. J.R., supra, at 602, citing Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975), which may eventually result in termination proceedings. Colorado, itself, by the enactment of the Termination of the Parent-Child Legal Relationship Act of 1977 (Title 19, Article 11, C.R.S. 1973) deliberately attempted to do away with any notion that fostered the presumption that children were property of their parents. Parents and children have equal status not only in their right to

permanent and sustaining family life, but also in their rights to life, liberty, and pursuit of happiness.

Exacting Constitutional scrutiny advocated by Petitioners in determining whether state intervention in the family unit is accomplished in the manner which is fundamentally fair sweeps too broadly. As expressed in Lassiter v. Department of Social Services of Durham County, N.C., supra,:

> "Applying the Due Process Clause is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake."

In applying this criteria, the court concluded that an indigent litigant has a right to appointed counsel when, if he loses, he may be deprived of his physical liberty. The court then weighed the factors to be evaluated in deciding what due process

requires as set out in Mathews v. Eldridge, 424 U.S. 319 (1976), against this conclusion, and found that the Constitution does not require appointment of counsel in every parental termination proceeding. Members of the extended family cannot be said to have representation rights beyond those of parents. So, too, under the standards laid down in Lassiter v. Department of Social Services of Durham County, N.C., supra, Petitioners are precluded from asserting that T.A.F. was inadequately represented. The distinction between GAL and attorney was previously noted. n. 2 supra. No standard or guideline, however, will assure that GALs follow in practice that which would advocate children's rights, pursue their grievances, and protect their rights. Although it is conceded that a child's separate interests in a termination

proceeding is great because of the trauma of permanent separation from family members, the liberty interests involved do not rise to the level espoused in Lassiter v. Department of Social Services of Durham County, N.C., supra.

CONCLUSION

For the reasons set forth above, this Court should deny Petitioners' Petition for Writ of Certiorari to the Colorado Court of Appeals.

Respectfully submitted,

William Thiebaut, Jr.
of Ballas, Maggio & Thiebaut, P.C.
401 W. 12th Street
Pueblo, Colorado 81002
Phone: 544-3800
Attorney for Respondents